PreGel Am., Inc. v. Casol, 2023 NCBC 81.

STATE OF NORTH CAROLINA CABARRUS COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 23 CVS 1233
PREGEL AMERICA, INC., Plaintiff, v. MARCO CASOL and TANIA SOVILLA, Defendants.	**ORDER AND OPINION ON CROSS-MOTIONS FOR PARTIAL SUMMARY JUDGMENT**

1. **THIS MATTER** is before on the Court on Plaintiff PreGel America's Motion for Partial Summary Judgment on Its Declaratory Judgment Claims ("Plaintiff's Motion")[1] and Defendant Marco Casol's Motion for Partial Summary Judgment ("Defendant's Motion"; together, the "Cross-Motions" or "Motions"), each filed under Rule 56 of the North Carolina Rules of Civil Procedure (the "Rule(s)") on 18 August 2023 in the above-captioned action.[2]

2. Having considered the Motions, the parties' briefs in support of and in opposition to the Motions, the arguments of counsel at the hearing on the Motions, and other appropriate matters of record, the Court, in the exercise of its discretion, hereby **DENIES** Plaintiff's Motion and **GRANTS** Defendant's Motion as set forth below.

Bradley Arant Boult Cummings, LLP, by Dana C. Lumsden, Brett L. Lawrence, and Hanna E. Eickmeier, for Plaintiff PreGel America, Inc.

[1] (PreGel America's Mot. Partial Summ. J. Its Declaratory J. Claims, ECF No. 33.)

[2] (Def. Marco Casol's Mot. Partial Summ. J., ECF No. 31.)

Bell, Davis & Pitt, P.A., by Edward B. Davis, Lacey M. Duskin, and Kevin J. Roak, for Defendants Marco Casol and Tania Sovilla.

Bledsoe, Chief Judge.

I.

FACTUAL AND PROCEDURAL BACKGROUND[3]

3. While the Court does not make findings of fact on a motion for summary judgment, "it is helpful to the parties and the courts for the trial judge to articulate a summary of the material facts which he considers are not at issue and which justify entry of judgment." *Collier v. Collier*, 204 N.C. App. 160, 161–62 (2010) (citation and quotation marks omitted). Accordingly, the following background, drawn from the undisputed evidence submitted by the parties, is intended only to provide context for the Court's analysis and ruling and not to resolve issues of material fact.

4. Plaintiff PreGel America, Inc. ("PreGel" or "Plaintiff") is the United States subsidiary of PreGel S.p.A., an Italian company that produces and distributes dessert pastes, powders, flavors, and ingredients.[4] PreGel is currently governed by its Third

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[3] The parties have stipulated to a set of documents that the Court may consider for its resolution of the Cross-Motions. (Stipulated R. Indemnification Mots. [hereinafter "Stipulated Record"], ECF No. 29.) The documents within the Stipulated Record are individually labelled by document number, and some documents have been filed individually on the Court's electronic docket. Citations to these documents will refer to the document number according to its position in the table of contents and the page range in which the document appears within the Stipulated Record or to the versions filed on the docket as applicable.

[4] (Stipulated Record 51–77, Doc. 4, Pl.'s First Am. Compl. ¶ 12 [hereinafter "Fed. Am. Compl."]; Stipulated Record 78–95, Doc. 5, Defs.' Answer Am. Compl. and Affirmative Defenses ¶ 12 [hereinafter "Fed. Answer"]; Am. Compl. ¶ 40, ECF No. 12; Defs.' Answer and Affirmative Defenses Pl.'s Am. Compl. and Marco Casol's Countercls. Against Pl. ¶ 40 [hereinafter "Answer" or "Countercls."], ECF No. 20.) Pinpoint citations to "Answer" will refer to Defendants' responses to the allegations in the Amended Complaint. Pinpoint citations to "Countercls." will refer to the allegations in Casol's counterclaims.

Amended and Restated Bylaws, which were ratified in 2018 (the "Bylaws").[5]

5. Defendant Marco Casol ("Casol" or "Defendant") and his wife Defendant Tania Sovilla ("Sovilla") are Italian citizens. PreGel hired Casol in 2003, and from 2007 until 2020, Casol served as PreGel's President and CEO.[6] Casol also served as PreGel's Treasurer beginning in 2011.[7] PreGel employed Sovilla as an inventory specialist from 2012 until 2019.[8]

6. PreGel alleges that during Casol's employment, and especially during his tenure as PreGel's CEO, he and Sovilla defrauded PreGel and violated its policies in multiple ways, including by approving unauthorized salary increases for Casol,[9] misusing corporate credit cards, personnel, and property,[10] and misappropriating

[5] (Am. Compl. Ex. C, Third Am. and Restated Bylaws PreGel America, Inc. [hereinafter "Bylaws"]; Fed. Am. Compl. ¶ 57; Fed. Answer ¶ 57; Am. Compl. ¶ 14; Answer ¶ 14.) In certain places, the document attached as Exhibit C to the Amended Complaint is titled "Second Amended and Restated Bylaws of PreGel America, Inc." However, the parties have stipulated that this document is the third and current set of the Bylaws. (Stipulated Record 112.)

[6] (Fed. Am. Compl. ¶¶ 13–14; Fed. Answer ¶¶ 13–14; Am. Compl. ¶¶ 46–47; Answer ¶¶ 46–47.)

[7] (Fed. Am. Compl. ¶ 14; Fed. Answer ¶ 14; Am. Compl. ¶ 47; Answer ¶ 47.)

[8] (Fed. Am. Compl. ¶ 15; Fed. Answer ¶ 15; Am. Compl. ¶ 48; Answer ¶ 48.)

[9] (Fed. Am. Compl. ¶¶ 28–60; Am. Compl. ¶¶ 57–95.)

[10] (Fed. Am. Compl. ¶¶ 61–69, 83–86, 92–98; Am. Compl. ¶¶ 96–109.)

corporate funds for their personal benefit.[11] Due to these and other alleged violations of company policy, PreGel terminated Casol's employment on 13 February 2020.[12]

7. Shortly after Casol's termination, Plaintiff sued Casol in the United States District Court for the Western District of North Carolina, in a case captioned *PreGel America, Inc. v. Casol*, Case No. 3:20-CV-00470-MOC-DSC (the "Federal Action"), asserting claims for breach of contract, breach of fiduciary duty, fraud, constructive fraud, conversion, unfair and deceptive trade practices in violation of N.C.G.S. § 75-1.1, and violation of N.C.G.S. § 1-538.2.[13]

8. The Federal Action proceeded for two years until it was dismissed for lack of subject matter jurisdiction on 10 March 2023.[14]

9. Shortly thereafter, Casol's counsel sent a letter dated 16 March 2023 to PreGel's counsel demanding that PreGel indemnify Casol under Article Eight of the Bylaws for the litigation expenses Casol incurred in defending against the Federal Action.[15]

10. PreGel's counsel responded to this letter on 17 April 2023, contending that Casol was not entitled to indemnification under the Bylaws because the expenses he

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[11] (Fed. Am. Compl. ¶¶ 18–19, 22, 87–91, 99–109, 112–23; Am. Compl. ¶¶ 51, 96, 126–52, 156–70.) Defendants deny all of these allegations.

[12] (Fed. Am. Compl. ¶ 13; Fed. Answer ¶ 13; Am. Compl. ¶¶ 53–56.) Defendants deny Plaintiff's allegations of Casol's misconduct in their Answer but admit that PreGel terminated Casol's employment on 13 February 2020. (Answer ¶ 94.)

[13] (Fed. Am. Compl. ¶¶ 124–57.)

[14] *PreGel America, Inc. v. Casol*, No. 3:20-CV-00470-MOC-DSC, 2023 U.S. Dist. LEXIS 40296 (W.D.N.C. Mar. 10, 2023); (Stipulated Record 96–103, Docs. 6–7).

[15] (Am. Compl. Ex. A.)

incurred resulted from "activities which were at the time taken known or believed by him to be clearly in conflict with the best interests of the corporation."[16]

11. On the same day, Plaintiff initiated this action, asserting substantially similar claims as in the Federal Action.[17] Plaintiff also sought a declaration that PreGel was not required to indemnify Casol under the Bylaws for his expenses incurred in defense of the Federal Action.[18]

12. Ten days later, on 27 April 2023, Defendants' counsel sent two letters to Plaintiff's counsel demanding indemnification under N.C.G.S. §§ 55-8-52 and 55-8-56.[19] Plaintiff's counsel responded on 1 June 2023 rejecting this demand.[20]

13. On 12 June 2023, Plaintiff filed an Amended Complaint, adding claims for declaratory judgment to determine that PreGel did not owe Casol indemnification either under the Bylaws or under N.C.G.S. §§ 55-8-52 and 55-8-56.[21] Defendants filed their answer to the Amended Complaint on 18 July 2023, which included Casol's counterclaim for a declaratory judgment to determine that he is presently owed

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[16] (Am. Compl. Ex. B.) The quoted language appears in N.C.G.S. § 55-8-57(a) as a circumstance prohibiting indemnification and is virtually identical to the indemnification provision in the Bylaws. (Bylaws Art. 8, Sec. 1(b).)

[17] (*See* Complaint ¶¶ 164–206 [hereinafter "Original Compl."], ECF No. 3.)

[18] (Original Compl. ¶¶ 164–73.)

[19] (Am. Compl. Exs. E–F.)

[20] (Am. Compl. Ex. G.)

[21] (Am. Compl. ¶¶ 171–91.)

mandatory indemnification under N.C.G.S. §§ 55-8-52 and 55-8-56.[22]

14. The Court convened a Case Management Conference (the "Conference") in the above-captioned case on 20 July 2023. At the Conference, the parties agreed with the Court that their competing declaratory judgment claims presented discrete issues that could be resolved on summary judgment prior to the resolution of the other pending claims. Accordingly, the Court established a two-phase summary judgment briefing schedule, with dispositive motions on the parties' respective declaratory judgment claims filed first, followed several months later by dispositive motions on the parties' remaining claims.[23]

15. On 18 August 2023, the parties timely filed the Cross-Motions. PreGel's Motion asks the Court to enter summary judgment for PreGel on its declaratory judgment claims to determine that Casol is not entitled to indemnification under either the Bylaws or sections 55-8-52 and 55-8-56. Casol's Motion seeks summary judgment on his declaratory judgment counterclaim to determine that Casol is entitled to indemnification under these same statutory provisions.[24] After full briefing, the Court convened a hearing on the Cross-Motions (the "Hearing") on 24

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[22] (Countercls. ¶¶ 1–9.) The numbering of Casol's counterclaim paragraphs repeat following paragraph three. The Court's citation refers to the paragraphs beginning from the "First Claim for Relief" subheading.

[23] (Case Management Order ¶¶ 25, 29, ECF No. 22; Scheduling Order and Notice Hearing, ECF No. 23.) The deadline for filing dispositive motions on the parties' remaining claims has not yet expired.

[24] Casol does not currently seek a declaratory judgment that he is entitled to permissive indemnification under the Bylaws.

October 2023, at which all parties were represented by counsel. The Cross-Motions are now ripe for resolution.

II.

LEGAL STANDARD

16. Under Rule 56(c), "[s]ummary judgment is appropriate 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' " *Da Silva v. WakeMed*, 375 N.C. 1, 10 (2020) (quoting N.C. R. Civ. P. 56(c)). "A genuine issue of material fact is one that can be maintained by substantial evidence." *Curlee v. Johnson*, 377 N.C. 97, 101 (2021) (cleaned up). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion and means more than a scintilla or a permissible inference[.]" *DeWitt v. Eveready Battery Co.*, 355 N.C. 672, 681 (2002) (cleaned up). "An issue is material if, as alleged, facts 'would constitute a legal defense, or would affect the result of the action or if its resolution would prevent the party against whom it is resolved from prevailing in the action.' " *Bartley v. City of High Point*, 381 N.C. 287, 292 (2022) (quoting *Koontz v. City of Winston-Salem*, 280 N.C. 513, 518 (1972)). "When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the nonmoving party." *Belmont Ass'n v. Farwig*, 381 N.C. 306, 310 (2022) (quoting *Dalton v. Camp*, 353 N.C. 647, 651 (2001)).

17. "The party seeking summary judgment bears the initial burden of demonstrating the absence of a genuine issue of material fact." *Liberty Mut. Ins. Co. v. Pennington*, 356 N.C. 571, 579 (2002). The movant may meet this burden either (1) "by proving an essential element of the opposing party's claim does not exist, cannot be proven at trial, or would be barred by an affirmative defense," or (2) "by showing through discovery that the opposing party cannot produce evidence to support an essential element of [its] claim[.]" *Dobson v. Harris*, 352 N.C. 77, 83 (2000) (cleaned up). If the movant meets its burden, "the burden shifts to the nonmoving party to produce a forecast of evidence demonstrating that the nonmoving party will be able to make out at least a prima facie case at trial[.]" *Cummings v. Carroll*, 379 N.C. 347, 358 (2021) (cleaned up); *see also* N.C. R. Civ. P. 56(e) ("[A]n adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.").

III.

ANALYSIS

A. Permissive Indemnification Under the Bylaws

18. Plaintiff's Motion first seeks summary judgment on its claim for a declaratory judgment determining that Casol is not owed permissive indemnification under the Bylaws.

19. Article 8, Part 5 of Chapter 55 provides the conditions under which a corporation may or shall indemnify its officers and directors. N.C.G.S. § 55-8-51

addresses permissive indemnification of directors, and N.C.G.S. § 55-8-57(a) provides for permissive indemnification of officers.[25] Pursuant to these statutes, the Bylaws provide that any PreGel officer "shall have the right to be indemnified and held harmless by the corporation to the fullest extent from time to time permitted by law against all liabilities and litigation expenses [ ] in the event a [legal] claim shall be made or threatened against that person . . . arising out of such service [to PreGel]."[26] Consistent with section 55-8-57(a)(1), the Bylaws also provide that "such indemnification shall not be effective with respect to . . . any liabilities or litigation expenses incurred on account of any of the Claimant's activities which were[,] at the time taken[,] known or believed by the Claimant to be clearly in conflict with the best interests of the corporation."[27] Plaintiff alleges in its Amended Complaint that Casol is not entitled to indemnification because it is undisputed that Casol knew, at the time taken, that his alleged misconduct was clearly in conflict with PreGel's best interests.[28]

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[25] N.C.G.S. § 55-8-56(3) additionally provides that a corporation "may also indemnify and advance expenses to an officer, employee, or agent who is not a director to the extent . . . that may be provided by its articles of incorporation, bylaws, general or specific action of its board of directors, or contract."

[26] (Bylaws Art. 8, Sec. 1.)

[27] (Bylaws Art. 8, Sec. 1(b)); *see* N.C.G.S. § 55-8-57(a) (stating, in part, that "a corporation may not indemnify or agree to indemnify a person against liability or expenses he may incur on account of his activities which were at the time taken known or believed by him to be clearly in conflict with the best interests of the corporation").

[28] (Am. Compl. Ex. B 2.)

20. Oddly enough on a motion for summary judgment, both parties agree that indemnification under the Bylaws is premature, but for different reasons.[29] Plaintiff argues that ordering indemnification under the Bylaws must await a finding that Casol did not know or believe that his actions were clearly in conflict with the best interests of the company. Defendant contends that—despite demanding indemnification under the Bylaws in his 16 March 2023 demand letter[30] and admitting that the parties dispute the interpretation of Plaintiff's obligations under the Bylaws' indemnification provision[31]—indemnification under the Bylaws is premature because he does not seek such relief in his counterclaim or through his 27 April 2023 demand letter.[32]

21. The Court agrees that summary judgment on this issue is premature, but only for the reason asserted by Plaintiff. The Court is not prepared to conclude, as Casol seemingly suggests, that Defendant can erase his actions that created a case or controversy by delaying the filing of his claim to a later time. Since neither party has submitted evidence—much less undisputed evidence—as to whether Casol knew or

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[29] (*Compare* Mem. Law Supp. PreGel America's Mot. Partial Summ. J. Its Declaratory J. Claims 10 (noting resolution of indemnification under the Bylaws must be delayed "until those factual allegations are resolved by the Court or by the jury"), ECF No. 34, *with* Def.'s Resp. PreGel's Mot. Partial Summ. J. 4 [hereinafter "Def.'s Br. Resp."] (noting that "there is no active controversy" as to permissive indemnification under the Bylaws), ECF No. 39.)

[30] (Am. Compl. Ex. A.)

[31] (*Compare* Am. Compl. ¶¶ 18, 172–81, *with* Answer ¶¶ 18, 172–81.)

[32] (Def.'s Br. Resp. 1–4; Answer ¶ 176.) Casol does not argue that he never sought permissive indemnification under the Bylaws, but rather that he "changed course to seek only mandatory indemnification" after the appeals period on the Federal Action had concluded. (Br. Supp. Def. Casol's Mot. Partial Summ. J. 6, n.1, ECF No. 32.)

believed his actions were clearly in conflict with the best interests of the company, Plaintiff's Motion on its declaratory judgment claim concerning the availability of indemnification under the Bylaws will be denied as premature.

B. Mandatory Indemnification Under N.C.G.S. §§ 55-8-52 and 55-8-56

22. Both parties seek summary judgment on their respective claims for declaratory judgment on whether Casol is entitled to mandatory indemnification under N.C.G.S. §§ 55-8-52 and 55-8-56.

23. N.C.G.S. § 55-8-52 states as follows:

> Unless limited by its articles of incorporation, a corporation shall indemnify a director who was wholly successful, on the merits or otherwise, in the defense of any proceeding to which he was a party because he is or was a director of the corporation against reasonable expenses incurred by him in connection with the proceeding.

Although section 55-8-52 refers only to directors, section 55-8-56 extends its application to corporate officers.[33] Importantly, PreGel's Articles of Incorporation neither address indemnification nor purport to limit the application of any of these statutes.[34]

24. The parties' competing claims require the Court to interpret section 55-8-52. To that end, our Supreme Court has instructed that:

> Statutory interpretation properly begins with an examination of the plain words of the statute. If the statutory language is clear and unambiguous, the court eschews statutory construction in favor of giving the words their plain and definite meaning. However, where the

[33] N.C.G.S. § 55-8-56 provides that "[a]n officer of the corporation is entitled to mandatory indemnification under G.S. 55-8-52, and is entitled to apply for court-ordered indemnification under G.S. 55-8-54, in each case to the same extent as a director."

[34] (Stipulated Record 110–11, Docs. 14–15.)

> statute is ambiguous or unclear as to its meaning, the courts must interpret the statute to give effect to the legislative intent. Canons of statutory interpretation are only employed if the language of the statute is ambiguous or lacks precision, or is fairly susceptible of two or more meanings.

Belmont Ass'n, 381 N.C. at 310–11 (cleaned up).

25. Section 55-8-52 requires that an officer or director must be "wholly successful, on the merits or otherwise in the defense of any proceeding" to obtain mandatory indemnification for his or her reasonable expenses. "Wholly successful" is not defined in the statute or in related statutes, and the Court finds that the phrase is ambiguous. In such circumstances, the Supreme Court has held that "the commentary to a statutory provision can be helpful in some cases in discerning legislative intent." *Parsons v. Jefferson-Pilot Corp.*, 333 N.C. 420, 425 (1993); *see also State v. Bogle*, 324 N.C. 190, 202 n.5 (1989) ("[W]e are not bound by the commentary but give it substantial weight in our efforts to discern legislative intent.").

26. The Official Comment to section 55-8-52 (the "Comment") provides that "[a] defendant is 'wholly successful' only if the entire proceeding is disposed of on a basis which involves a finding of nonliability" and includes situations where a defendant may prevail "because of procedural defenses not related to the merits."[35] "Liability"

[35] N.C.G.S. § 55-8-52 cmt. Casol argues at some length that the Court should prefer in its analysis the commentary to the 2016 version of the Model Business Corporation Act—which uses the phrase "which does not involve a finding of liability"—rather than the Official Comment to section 55-8-52, which uses the phrase "which involves a finding of nonliability." While the Court agrees with Casol that the Model Act's 2016 commentary is more consistent with the statute's language and purpose than the Official Comment, *see*, *e.g.*, Russell M. Robinson, II, *Robinson on North Carolina Corporation Law*, § 18.03 (observing that the Official Comment "is a much too restrictive construction of the statute"), the Court does not believe it is at liberty to prefer the Model Act's commentary over the Official Comment absent legislative direction.

is defined in N.C.G.S. § 55-8-50 as "the obligation to pay a judgment, settlement, penalty, fine (including an excise tax assessed with respect to an employee benefit plan), or reasonable expenses incurred with respect to a proceeding."[36] And section 55-8-50 defines a "proceeding" as "any threatened, pending, or completed action, suit, or proceeding, whether civil, criminal, administrative, or investigative and whether formal or informal."[37]

27. Considering these definitions together, the Court concludes that the Federal Action—a completed action—was a "proceeding" and that the dismissal of the Federal Action for lack of subject matter jurisdiction, while not involving an express finding of nonliability, reflected a victorious procedural defense unrelated to the merits. As such, the Court concludes that Casol was "wholly successful, on the merits or otherwise," in the Federal Action and thus that he is entitled to mandatory indemnification under sections 55-8-52 and 55-8-56. Plaintiff's contention that a "wholly successful" outcome requires the termination of a plaintiff's right to assert the dismissed claims[38] ignores both that the statutory language "on the merits *or otherwise*"[39] expressly contemplates a non-merits-based dismissal and that the

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[36] N.C.G.S. § 55-8-50(b)(4).

[37] N.C.G.S. § 55-8-50(b)(7).

[38] (*See* PreGel America's Mem. Law Reply Def. Marco Casol's Resp. Opp'n PreGel America's Mot. Partial Summ. J. 7, ECF No. 44 ("[S]uccess cannot be achieved absent a complete foreclosure of the ability for the corporation to bring the same claims in a different forum.").)

[39] N.C.G.S. § 55-8-52 (emphasis added).

Comment recognizes that successful "procedural defenses not related to the merits" entitle a defendant to mandatory indemnification. *See also Davis v. Egerton*, No. CIV.A.2:95 CV 95, 1997 WL 33810690, at *1 (M.D.N.C. Apr. 9, 1997) (determining that a party was "wholly successful" under section 55-8-52 because where there is no imposition of "an obligation to pay a monetary judgment to the opposing party, the result is a finding of non-liability under the plain meaning of [Chapter 55]").

28. The Court's conclusion finds support from other jurisdictions, including in particular, the Delaware Court of Chancery.[40] *See, e.g.*, *Meyers v. Quiz-DIA LLC*, 2017 Del. Ch. LEXIS 96, at *18–19 (Del. Ch. June 6, 2017) (" 'Success' includes the dismissal without prejudice of a federal action, even if the same claims are re-alleged in state court at a later date.")[41]; *Zaman v. Amedeo Holdings, Inc.*, 2008 Del. Ch. LEXIS 60, at *72 (Del. Ch. May 23, 2008) (finding manager plaintiffs "successful, on the merits or otherwise," following a dismissal due to a jurisdictional defect, noting that "[t]he fact that the dismissal of a lot of the counts was without prejudice does not mean that the [plaintiffs] were not successful"); *see also Li v. loanDepot.com, LLC*, 2019 Del. Ch. LEXIS 139, at *1 (Del. Ch. Apr. 24, 2019) ("The Company subsequently dismissed the arbitration against Li without prejudice, triggering the portion of Li's

[40] *Reynolds Am. Inc. v. Third Motion Equities Master Fund Ltd.*, 379 N.C. 524, 528 (2021) (relying on Delaware caselaw to resolve legal issue under Chapter 55); *Corwin v. Brit. Am. Tobacco PLC*, 371 N.C. 605, 613 (2018) (same).

[41] Delaware's indemnity statute, 8 Del. C. § 145(c), requires only that a director be "successful," not "wholly successful" as the North Carolina statute requires. Although PreGel argues that this distinction impairs the usefulness of the Delaware cases, the Court disagrees because the reasoning in the Delaware cases applies equally to the North Carolina standard.

fullest-extent-of-the-law indemnification right that applies when an indemnitee has been successful on the merits or otherwise.").

29. The *Zaman* case is worthy of elaboration. There, the Delaware Court of Chancery awarded indemnification following dismissal of a federal action, finding conclusive that "the [plaintiffs] did not choose to be sued in federal court," defendants instead "chose the forum," the federal action "was over," and "[a]t the time of the dismissal, no claims were pending against the [plaintiffs] anywhere." *Zaman*, 2008 Del. Ch. LEXIS 60, at *70–71. In support of its conclusion to award indemnification immediately after dismissal of the federal action, the court stated that "[t]he fact that the [plaintiffs] might not succeed in defending against the similar reasserted claims brought against them by [defendants] in a different action . . . does not justify delay." *Id.* at 71.

30. In its relevant particulars, *Zaman* is substantially similar to the undisputed facts here. Casol did not choose to be sued in federal court, PreGel instead chose the federal forum, the Federal Action has been dismissed and cannot be further pressed in that forum, and at the time the Federal Action was dismissed, PreGel had no other claims pending against Casol anywhere. And like the plaintiffs in *Zaman*, the fact that Casol may not prevail on his defenses in this action does not justify delay in awarding him the mandatory indemnification required by sections 55-8-52 and 55-8-56 for his reasonable expenses incurred in the Federal Action.[42]

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[42] Plaintiff's reliance on two federal court decisions applying Delaware law—*Galdi v. Berg*, 359 F. Supp. 698 (D. Del. 1973) and *Spira Footwear, Inc. v. Lebow*, 2008 U.S. Dist. LEXIS 129918 (W.D. Tex. Aug. 29, 2008)—is misplaced. Although *Galdi* concluded that the Delaware courts would find indemnification premature after the dismissal of one of two

31. For the foregoing reasons, therefore, the Court concludes that Defendant is presently entitled to mandatory indemnification under N.C.G.S. §§ 55-8-52 and 55-8-56 for his reasonable expenses incur–red in connection with the Federal Action and in obtaining this relief.[43] Accordingly, the Court will grant Defendant's Motion and deny Plaintiff's Motion.

C. Casol's Petition for Attorney's Fees

32. The parties contest the fees requested under Casol's fee petition affidavit, which was filed on 3 August 2023.[44] Given the apparent confusion concerning the Court's process for considering Casol's request for recovery of his reasonable expenses, and in light of Defendant's representation at the Hearing that it wishes to file a revised fee petition and supporting affidavit, the Court will permit Defendant to submit a revised fee petition and accompanying affidavit with briefing in accordance with Business Court Rule ("BCR") 7 as more specifically provided below.

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concurrent suits pressing similar claims in two forums, *Galdi*, 359 F. Supp. at 702, *Zaman* repudiated *Galdi* after concluding that indemnification in that case was due immediately. *See Zaman*, 2008 Del. Ch. LEXIS 60, at *71–72 ("In this respect, I recognize that there are prior cases holding that if similar claims are pending in two forums simultaneously, dismissal of one case so that the other case can go forward does not constitute success."). Because *Spira* relied upon the now-rejected *Galdi* decision, *see Spira Footwear, Inc.*, 2008 U.S. Dist. LEXIS 129918, at *42–45, it, too, lacks persuasive force.

[43] *See* N.C.G.S. § 55-8-54(1) ("On receipt of an application, the court . . . may order indemnification if it determines [t]he director is entitled to mandatory indemnification under G.S. 55-8-52, in which case the court *shall* also order the corporation to pay the director's reasonable expenses incurred to obtain court-ordered indemnification[.]" (emphasis added)). As noted, section 55-8-56(1) permits an officer to apply for court-ordered indemnification under section 55-8-54 "to the same extent as a director."

[44] (Att'y Fee Aff., ECF No. 24.)

IV.

CONCLUSION

33. **WHEREFORE**, this Court hereby **ORDERS** as follows:

a. Plaintiff's Motion is hereby **DENIED**.

b. Defendant's Motion is hereby **GRANTED**, summary judgment is hereby **ENTERED** for Defendant against Plaintiff on Casol's declaratory judgment claim for mandatory indemnification under sections 55-8-52 and 55-8-56, and the Court hereby **ENTERS JUDGMENT** declaring that Casol is presently entitled to indemnification from PreGel for his reasonable expenses incurred in defense of the Federal Action under sections 55-8-52 and 55-8-56 and for his reasonable expenses incurred in obtaining court-ordered indemnification as provided under sections 55-8-54(1) and 55-8-56.

c. Casol shall file, no later than 21 December 2023, a revised petition for his reasonable expenses incurred in the defense of the Federal Action along with any supporting materials. By the same date, Casol shall also file redacted billing records on the Court's electronic docket and provide unredacted billing records to the Court by e-mail to the Court's law clerk for the Court's *in camera* review. The Court encourages the parties to meet and confer to resolve any disputes about Casol's requested fees.

d. In the event the parties are unable to resolve any disputes about Casol's fee petition, Plaintiff shall file its response to Casol's fee petition no later than 10 January 2024.

e. Casol shall file his reply to Plaintiff's response no later than 22 January 2024.

f. All briefing in support of and in opposition to the anticipated fee petition shall comply with BCR 7.

SO ORDERED, this the 1st day of December, 2023.

/s/ Louis A. Bledsoe, III
Louis A. Bledsoe, III
Chief Business Court Judge